BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules	)	MB Docket No. 08-90
and Embedded Advertising	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to comments submitted in response to the above-captioned Notice of Inquiry and Notice of Proposed Rulemaking ("*Notice*").[1] The record demonstrates that the Commission does not have the statutory authority necessary to expand sponsorship identification requirements to cable programming, and that, even if the Commission did have authority to do so, there is no justification for taking such action. Moreover, the existing regulation applying sponsorship identification requirements to cable origination programming is invalid.[2]

The statute that empowers the Commission to regulate sponsorship identification applies only to broadcasting. Section 317 of the Communications Act of 1934, as amended (the "Act"), does not give the Commission power to apply sponsorship identification requirements to cable programming networks. As explained by NCTA,

> The Commission has no statutory authority to impose [the current sponsorship identification requirements on cable networks], much less to broaden them to include product placement disclosures. Imposing such extensive content regulation on cable operators and programmers would also raise serious First Amendment issues. Moreover, such regulation would constrain the ability of cable programmers to adapt to significant

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1 *In re Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd 10682 (2008) ("*Notice*").

2 *See* 47 C.F.R. § 76.1615.

> changes that are occurring in the marketplace for video advertising, and could therefore have adverse effects on the price, quality and diversity of programming available to consumers.[3]

As the National Media Providers explain, the Commission "not only lacks any authority to impose sponsorship identification regulations on cable networks, [but also] exceeded its authority when it first adopted the cable origination rules in 1969."[4]

The plain language of Section 317 refers only to "matter broadcast by any radio station."[5] Accordingly, Section 317 could not -- and did not -- give the Commission authority to promulgate sponsorship identification regulations for cable programming or origination cablecasting.[6] Nor was such authority conferred upon the Commission in the Cable Acts of 1984 or 1992. Where Congress *has* sought to apply a broadcasting rule to cable, it has made such an intention clear, as it did expressly with respect to the rules providing equal time for political candidates[7] and restricting advertising during children's television.[8] Congress could have done the same thing for Section 317, but it did not.

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[3] NCTA Comments at 1-2; *see also* National Media Providers Comments at 39 ("[B]oth the plain language and legislative history of the Act make clear that any effort to apply Section 317 to cable networks would be invalid."); Starz Entertainment and Ovation Comments at 8 (asserting that extension of the sponsorship identification requirements to cable programming services "would provide a constitutionally questionable solution to a phantom problem"); Progress and Freedom Foundation Comments at 5 (asserting that "the regulatory 'remedies' outlined in the Notice to address the fictive harm are straightforwardly unconstitutional"). For purposes herein, unless otherwise designated, all citations to comments are to filings made in MB Docket No. 08-90.

[4] National Media Providers Comments at 36.

[5] *See* 47 U.S.C. § 317(a)(1). Radio broadcasters are regulated pursuant to Title III of the Communications Act of 1934. Cable operators are regulated pursuant to Title VI.

[6] *See* NCTA Comments at 2 ("Nothing in the Communications Act specifically directs or even authorizes the Commission to impose new sponsorship identification requirements of any sort on origination cablecasting by cable operators or on programming provided by cable networks. In fact, the source of the FCC's sponsorship identification rules -- Section 317 -- does not mention cable television at all.").

[7] *See* 47 U.S.C. § 315(c)(1) (for purposes of Section 315, "'broadcasting station' includes a community antenna television system"). As PR Newswire previously explained, although Congress was aware of the FCC's decision to apply sponsorship identification rules to cable, in both the Cable Act of 1984 and the Cable Act of 1992, "[Congress] did not incorporate into the Act statutory authority for such FCC action. It made no such conforming

(footnote continued…)

Nor can the Commission rely on the general grants of authority in Sections 4(i) and 303(r) of the Act[9] to regulate the content of cable programming or origination cablecasting. The D.C. Circuit has held that neither of these general provisions can be used to promulgate regulations where the Commission is without delegated authority from Congress to take action.[10] This is particularly true where the regulations at issue implicate First Amendment considerations.[11] As the D.C. Circuit held in *MPAA*, "Congress has been *scrupulously clear* when it intends to delegate authority to the FCC to address areas significantly implicating program content."[12] This is not such a case. It is clear, therefore, that the Commission does not

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(…footnote continued)

change in the law despite the fact that it had amended the Section 315 political broadcasting rules in 1971 to encompass origination cablecasting." PR Newswire Association et al. Comments at 40-41, MB Dkt. No. 05-171 (June 22, 2005) (internal citations omitted).

[8] *See* Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394 (defining "commercial television broadcast licensee" to include "a cable operator"). The Commission has authority to take the actions it has already taken regarding children's television.

[9] 47 U.S.C. §§ 154(i), 303(r).

[10] *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 806-07 (D.C. Cir. 2002) ("*MPAA*"). Otherwise, the FCC's ancillary jurisdiction would be boundless unless Congress specifically acted to limit it. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 702-03 (D.C. Cir. 2005).

[11] *See MPAA*, 309 F.3d at 805. The constitutional avoidance canon of statutory interpretation also prevents agency expansion of the relevant statute. Agencies (and courts) must construe statutes in ways that avoid constitutional conflicts (or issues). *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.") (quoting *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991)).

[12] *MPAA*, 309 F.3d at 805 (emphasis added). In this regard, the Court approvingly quoted then-Chairman Powell's discussion of Section 4(i):

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions. And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.

Id. at 806 (quoting Separate Statement of Chairman Michael K. Powell, Concurring In Part And Dissenting In Part, *Implementation of Video Description of Video Programming*, Report & Order, 15 FCC Rcd 15,230, 15,276 (2000)).

have the statutory authority to apply sponsorship identification requirements to cable programming or origination cablecasting.

Moreover, the rationale for applying sponsorship identification requirements to broadcasting does not apply to cable programming or origination cablecasting. Broadcasters are authorized by the Commission to use *public* airwaves in exchange for a commitment to operate in "the *public* interest." Cable operators use *private* capital to build *private* facilities; they do *not* obtain their authority to operate from the Commission, and they are subject to various statutory requirements, but *not* Section 317. As the Supreme Court held in *Turner I*, "*the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation*, whatever its validity in the cases elaborating it, *does not apply in the context of cable regulation*."[13] Even the Center for Media and Democracy, a proponent of expanded sponsorship identification requirements in news programming, frequently grounds its argument in the responsibilities attaching to the use of the *public airwaves*.[14] The Commission, therefore, has no more authority to regulate the content of cable programming or origination cablecasting than it has to regulate that of a newspaper or a news page or blog post on the Internet.

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[13] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (emphasis added). *But see Amendment of the Commission's Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789, and 76.221*, Report & Order, 52 FCC 2d 701 ¶ 37 (1975) ("We see no reason why the [sponsorship identification] rules for such cablecasting should be different from those for broadcasting").

[14] *See* Center for Media and Democracy Comments at 6, 7 (focusing on new sponsorship identification requirements for "licensees"); *see also* Diane Farsetta & Daniel Price, Center for Media and Democracy, *Still Not the News: Stations Overwhelmingly Fail To Disclose VNRs* at 68 (Nov. 14, 2006) (explaining that "TV stations are given free use of the public airwaves, in exchange for their promise to serve the 'public interest'"), *at* http://www.prwatch.org/pdfs/CMD_Report_Public.pdf (last visited Nov. 20, 2008); Letter from Josh Silver, Executive Director, Free Press & John Stauber, Executive Director, Center for Media and Democracy, to Chairman Kevin Martin, FCC, at 1 (Mar. 21, 2005) (calling on the FCC to initiate "an investigation of *broadcast licensees* to serve public interest goals" because "*licensed stations* across the country routinely broadcast" reports using government-sponsored VNRs) (emphasis added).

The record demonstrates that expanding sponsorship identification requirements would be unlawful, and that the proposals are solutions in search of a problem. Even if the Commission had the requisite authority to implement the proposed rules, "there is no justification for imposing new and more burdensome regulations on advertiser-supported media."[15] In the words of one commenter, instead of "presuming that new rules should be adopted," the Commission "should approach this proceeding with full awareness of and appreciation for the well-established public interest value of preserving advertiser-supported media as one of the most universally available and affordable options presented to consumers in an expanding media universe."[16] Accordingly, we respectfully request that the Commission focus its efforts elsewhere and not seek to further regulate cable programming.

Respectfully submitted,

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[15] National Media Providers Comments at 6; Starz Entertainment and Ovation Comments at 1 ("The Commission should neither expand the broadcast sponsorship identification requirements nor apply such requirements to cable programming services or theatrical motion pictures.").

[16] National Media Providers Comments at 7.